No. 86-319

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

JOHN R. VAN DRASEK, PETITIONER

v.

JOHN F. LEHMAN, SECRETARY OF THE NAVY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

ALBERT G. LAUBER, JR.
Deputy Solicitor General

MICHAEL K. KELLOGG
Assistant to the Solicitor General

RICHARD A. OLDERMAN
CHARLES R. GROSS
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

KEITH T. SEFTON
Lt. Col., USMC
Office of the Judge Advocate General
Department of the Navy
Alexandria, Va. 22332

QUESTION PRESENTED

Whether the district court erred in declining to review petitioner's Complaint of Wrongs, filed pursuant to Article 138 of the Uniform Code of Military Justice, 10 U.S.C. 938.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit (Pet. App. A1) is unreported. The opinion of the United States Court of Appeals for the District of Columbia Circuit transferring the appeal to the Federal Circuit (Pet. App. A9-A18) is reported at 762 F.2d 1065. The opinion of the district court (Pet. App. A2-A8) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 1986, and a petition for rehearing

was denied on April 1, 1986. On July 8, 1986, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including August 29, 1986. The petition was filed on August 28, 1986, and was granted on December 1, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Article 138 of the Uniform Code of Military Justice, 10 U.S.C. 938, provides as follows:

> Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

The pertinent regulations in effect at the time of petitioner's Article 138 Complaint, including Chapter 11 of the Manual of the Judge Advocate General of the Navy (JAGMAN) and Chapter 11 of the Navy Regulations (Navy Regs.), which are lengthy, have been lodged with the Court as a separate Regulatory Appendix (Reg. App.).

STATEMENT

1. Article 138 of the Uniform Code of Military Justice, 10 U.S.C. 938, is one of several mechanisms

designed by Congress to handle the grievances of military personnel. Article 138 provides that any member of the armed forces "who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress," may file a complaint with a superior commissioned officer. The latter must forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom the wrongs are alleged. The officer exercising general court-martial jurisdiction must then "examine into the complaint and take proper measures for redressing the wrong complained of."

In August, 1982, petitioner was on active duty as a Captain in the United States Marine Corps. He was assigned to the Officer Candidates School (OCS) in Quantico, Virginia. The OCS is a subordinate command to the Marine Corps Development and Education Command (MCDEC) in Quantico. J.A. 8.

Petitioner served at OCS in a variety of positions. For a time, he was also the OCS representative on an Administrative Discharge Board (ADB). J.A. 8-9. An Administrative Discharge Board is a board of Marine officers constituted to decide whether a Marine should be recommended for separation before the expiration of his enlistment. The Board hears testimony and considers documentary evidence, then votes whether to recommend discharge or retention. If the Board recommends discharge, it also suggests the proper characterization of service (honorable, general, or other than honorable). Petitioner had been appointed by the Commanding General of MCDEC to serve as the OCS representative on an ADB for the period from July 1 to December 31, 1982 (J.A. 9).

On August 10, 1982, the commanding officer of OCS, Colonel M. T. Cooper, ordered petitioner transferred from OCS to another command within MCDEC (J.A. 10). Two days later, another officer was named to replace petitioner as the OCS representative on the ADB (*ibid.*). On August 13, petitioner met with Colonel Cooper and convinced him to allow petitioner to remain at OCS; the order concerning petitioner's transfer was thereupon cancelled (*ibid.*). Two days later, however, petitioner suffered a severe leg fracture while parachuting, and Colonel Cooper again ordered his transfer, effective September 28 (*ibid.*).

On September 29, 1982, petitioner initiated a Complaint of Wrongs under Article 138 against Colonel Cooper. Petitioner's Complaint described what he perceived to be a general attitude and morale problem at OCS, which petitioner claimed was due, at least in part, to the "illegal and immoral" conduct of Colonel Cooper. Record of Proceedings, Article 138 Complaint 41 (Art. 138 Rec.). More specifically, petitioner charged Colonel Cooper with using his influence as a commanding officer to keep subordinates from providing favorable character evidence for OCS Marines who were defendants at courts-martial and administrative discharge proceedings (*id.* at 41-42). Petitioner further alleged that officer members of ADBs had been pressured to vote in accordance with Colonel Cooper's personal wishes (*ibid.*).

Petitioner indicated in his Complaint that he himself had never succumbed to improper command pressure with respect to his votes on the ADB. He did claim, however, that he had been chastised by Colonel Cooper's Executive Officer for voting to retain a particular OCS Marine despite Colonel Cooper's recommendation that the Marine be discharged (Art. 138 Rec. 42). Petitioner further alleged that he had been transferred from OCS, and in consequence removed as the OCS representative on the ADB, in retaliation for the way he had voted during his three-month tenure on the Board (*id.* at 42-43).

Petitioner's Complaint was submitted to the Commanding General of MCDEC, Colonel Cooper's immediate superior. On October 6, 1982, the Commanding General responded to petitioner, noting that his charges of undue command influence did not appear to be a proper subject for an Article 138 Complaint, but instead should be pursued by the alternative method of "request mast" (Art. 138 Rec. 40).[1] He further advised petitioner that the Complaint was not in the proper format (*ibid.*). As required by regulations (JAGMAN 1108e; Reg. App. 7), however, the Commanding General also advised petitioner that despite these defects he could have his Article 138 Complaint forwarded if it was amended to contain, inter alia, a statement of the specific relief desired (Art. 138 Rec. 40).

On October 8, 1982, petitioner restated his grievances and expressed his continuing desire to avail himself of the Article 138 process (Art. 138 Rec. 37-39). His restatement of grievances was substantially

[1] "Request mast" is a nonstatutory means by which members of the Navy and Marine Corps may request an opportunity to meet with a superior in the chain of command to air a grievance. Although "request mast" is designed to achieve resolution at the lowest possible level, a dissatisfied Marine can pursue this remedy to increasingly senior commanders. With few exceptions, the commander from whom "mast" has been requested may not refuse to consider the requestor's complaint. Navy Regs. 1107, Reg. App. 14; Marine Corps Order 1700.23C (Apr. 27, 1983).

the same as his original Complaint, except for the addition (*id.* at 39) of the following paragraph:

> 7. The relief I desire in this matter is: First, that this matter be investigated in accordance with [the JAGMAN]; second, that appropriate administrative action be taken to assure this situation does not occur in the future (see enclosed statement).

In the statement enclosed with this resubmission, petitioner noted that reassignment to OCS was "not a preferable [form of] relief" for him because he believed his effectiveness there would be hindered as a result of his perceived "lack of command loyalty" (*id.* at 44).

In accordance with regulations (JAGMAN 1103 (c), 1106(d); Reg. App. 4, 6-7), Colonel Cooper received petitioner's revised Article 138 Complaint and filed a rebuttal to petitioner's charges (Art. 138 Rec. 29-34). Colonel Cooper admitted making comments to his staff about providing testimony at courts-martial and before ADBs. He stated, however, that these comments were part of wide-ranging staff briefings, and he considered them to be only in the nature of "professional guidance" to the junior officers under his command. *Id.* at 29-30. Colonel Cooper denied ever having threatened anyone, counseled anyone, or taken action against anyone in his command for their participation in courts-martial or ADBs (*id.* at 30). Colonel Cooper further explained that petitioner had been transferred from OCS because of general dissatisfaction with his performance (*id.* at 30-33).

Attached to Colonel Cooper's rebuttal were statements from several of his staff officers. These statements disputed petitioner's contention that there was a morale problem at OCS. They also supported Colonel Cooper's claim that petitioner's transfer from

OCS and consequent removal from the ADB were not the product of petitioner's vote in any particular ADB proceeding. Art. 138 Rec. 45-49.

When the Commanding General received petitioner's revised Complaint and Colonel Cooper's rebuttal, he concluded that the rebuttal added "substantial comments and new factual matter" to the issues raised in the Complaint. As a result, on December 1, 1982, the Commanding General referred Colonel Cooper's endorsement back to petitioner so that he might provide material or comment in surrebuttal. Art. 138 Rec. 27. Because petitioner believed that the issues had been complicated by Colonel Cooper's comments, he requested and received assistance from a military lawyer in formulating his response (*id.* at 28).[2]

On January 14, 1983, petitioner provided his response, a seven-page, point-by-point surrebuttal containing 29 attachments. The attachments included statements by other individuals supporting petitioner's allegations of improper command influence and documents offered to rebut allegations that petitioner's performance of duty at OCS had been other than exemplary. Art. 138 Rec. 20-26. Petitioner also amended his Complaint with a demand for additional relief: "I request from Colonel Cooper a formal, written apology for and a retraction of all adverse matter affecting me" (*id.* at 26).

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[2] In accordance with JAGMAN 1107 (Reg. App. 7), petitioner was allowed to consult with a Judge Advocate to obtain advice concerning the submission of his Article 138 Complaint. However, again in accordance with regulation, this lawyer was not considered to be "representing" petitioner in the attorney-client sense of that word (*ibid.*). Petitioner was also entitled to retain civilian counsel (*ibid.*), but apparently he did not do so until review of his Article 138 Complaint had been completed (Art. 138 Rec. 4-5).

2. The Commanding General directed Colonel Curtis G. Lawson to conduct a "comprehensive preliminary inquiry and report into [petitioner's] complaint" (Art. 138 Rec. 92-93). On February 28, 1983, Colonel Lawson submitted a 22-page report, containing 26 attachments in addition to the 36 exhibits that were already part of the file (*id.* at 95-116). Among these attachments were statements from 22 individuals, including expanded or explanatory statements from many of the individuals who had earlier provided statements to petitioner and Colonel Cooper (*id.* at 133-163, 179-181, 186-242). Colonel Lawson's report contained specific findings of fact, with citations to supporting evidence, and made recommendations concerning three separate issues: petitioner's transfer from OCS, his removal as a voting member of the ADB, and his allegations about the exertion of improper command influence by Colonel Cooper in ADB proceedings and courts-martial.

After reviewing and weighing the evidence, Colonel Lawson concluded (1) that petitioner's transfer from OCS had not been improper but in fact had been planned prior to petitioner's appointment to the ADB; (2) that petitioner's removal from the ADB, although accomplished in an administratively incorrect manner, was precipitated by his transfer from OCS and was not in retaliation for his vote in any particular ADB proceeding; and (3) that, while the OCS command was highly sensitive to adverse rulings in courts-martial and ADB proceedings, Colonel Cooper had not exerted any "official or formal improper command pressure." Art. 138 Rec. 99-103, 103-107, 107-116. Colonel Lawson did note, however, that some members of OCS had misconstrued

the command's sensitivity and felt themselves discouraged from providing favorable character evidence on behalf of defendants in courts-martial and administrative discharge proceedings (*id.* at 115-116). Colonel Lawson also observed that some members of ADBs believed that their votes were subject to undue scrutiny from their superiors (*ibid.*). Colonel Lawson, therefore, recommended that steps be taken to eliminate these perceptions (*id.* at 116).

The Commanding General accepted Colonel Lawson's findings and concluded that petitioner "has neither wrongfully suffered any detriment, harm, or injury as a result of any improper action by Colonel Cooper nor does he seek redress which is cognizable under the provisions of [Article 138 and JAGMAN]" (Art. 138 Rec. 12). The Commanding General concluded that petitioner's transfer from OCS was not improperly motivated, and that petitioner was removed from the ADB simply because of his impending transfer from OCS, not because of his vote in any particular case (*id.* at 13). The Commanding General specifically noted that, when the administrative irregularities involved in petitioner's removal from the ADB were discovered, those irregularities were corrected and petitioner was returned to duty on the ADB. In fact, petitioner continued to serve on the ADB even after his transfer from OCS insofar as his medical condition permitted. *Ibid.*

In keeping with Colonel Lawson's recommendations, the Commanding General also issued directives concerning the general operation of the OCS command. First, the Commanding General directed that "proper administrative practices [be] followed with regard to the nomination, appointment, and relief of members of administrative discharge boards" (Art. 138 Rec. 14). Second, the Commanding General di-

rected Colonel Cooper to "ensure that his subordinate leaders fully understand the prohibition against improper interference with judicial and administrative proceedings and * * * ensure that personnel who serve on courts and boards are not improperly questioned with regard to the performance of these duties. In addition, members of the organization will be advised that their participation in judicial or administrative proceedings is not the subject of improper scrutiny" (*ibid.*). Finally, the Commanding General adverted to a statement made by Captain Becker, a witness in the Article 138 investigation, concerning alleged discrimination by Colonel Cooper against women Marines at OCS. Although this claim formed no part of petitioner's Complaint of Wrongs and, therefore, was not specifically investigated as part of the Article 138 proceeding, the Commanding General ordered that this allegation be brought to Colonel Cooper's attention, with the direction that policies concerning women Marines at OCS be formalized in accordance with regulations concerning the treatment of women in the armed forces. *Id.* at 14-15.

On April 25, 1983, the Judge Advocate General of the Navy reviewed the entire Article 138 proceeding in order to ensure substantial compliance with Article 138 and applicable regulations (see JAGMAN 1113a.(1)(a); Reg. App. 8). The Judge Advocate General agreed with the determinations made by the Commanding General and recommended that no further action be taken on petitioner's Complaint (Art. 138 Rec. 8-9). On May 17, 1983, the Secretary of the Navy concurred (J.A. 9).

3. Meanwhile, in March, 1983, while his Article 138 Complaint was still pending, petitioner was con-

sidered but not selected for promotion to Major (J.A. 12). Petitioner had previously been passed over for promotion in April, 1982 (J.A. 9), three months before he was appointed to serve on the ADB and five months before he filed his Article 138 Complaint. Since the March, 1983, decision marked the second time that petitioner had been passed over for promotion to the rank of Major, he was subject to mandatory discharge from the Marines under the "up or out" rule set forth in 10 U.S.C. 632.

Petitioner brought this suit in the United States District Court for the District of Columbia on June 17, 1983 (J.A. 1). The relief sought included a temporary restraining order preventing his discharge from the service and a declaration that his rights under Article 138, the First and Fifth Amendments, the JAGMAN and the Navy Regulations had been violated. Petitioner also sought a declaration that he had standing to use Article 138 to enforce the rights of third-party members of the Naval Service; a declaration that Colonel Lawson had inadequately investigated Captain Becker's allegations of discrimination against female OCS Marines; a declaration that Colonel Lawson's investigation into petitioner's Complaint and the record of that investigation were in violation of Article 138, the JAGMAN and other Navy Regulations; and a writ of mandamus ordering a new investigation into petitioner's Complaint, carried out by someone not associated with MCDEC. Petitioner also asked the district court to order the Navy to rewrite its regulations governing the processing of Article 138 Complaints so as to make military counsel available to assist complainants. Complaint 41-43 (June 17, 1983).

Petitioner's district court pleadings also advanced several employment-related claims that he had not raised in his Article 138 Complaint. He alleged that two of his performance evaluations were the result of bias and did not accurately reflect his conduct of his duties. He challenged his having been twice passed over for promotion as attributable, in part, to those biased evaluations. He challenged his involuntary discharge from the Marine Corps, which, because of his two passovers, was scheduled for no later than November 1, 1983. And he requested back pay stemming from his allegedly wrongful nonselection for promotion. Complaint 38-40, 41-42 (June 17, 1983).

On June 25, 1983, with the court's approval, the parties agreed (J.A. 2) to stay the proceedings in the district court while petitioner pursued available remedies for his employment-related claims with the Board for the Correction of Naval Records (BCNR). The focus of the BCNR's consideration was to be petitioner's allegations involving his performance evaluations, his two passovers for promotion, and his impending involuntary discharge that was predicated upon those passovers. Joint Stipulation 2. The BCNR also undertook to examine matters raised in petitioner's Article 138 Complaint to the extent that such matters were relevant to petitioner's employment-related claims (J.A. 19-20).

On November 7, 1983, after considering petitioner's application for relief, the 66 exhibits attached to it, testimony from petitioner and others, and advisory opinions from several specialized offices within the Marine Corps, the BCNR issued its opinion (J.A. 6-20). The BCNR declined to amend or to remove from petitioner's records the two performance evaluations that he challenged, finding no reason

to conclude that those reports were not fair and accurate (J.A. 19). The BCNR further concluded that petitioner's two promotion passovers were neither erroneous nor unjust, and specifically found to be groundless petitioner's allegation that his second passover was in retaliation for his Article 138 Complaint (J.A. 19-20). The BCNR, therefore, recommended no relief except that efforts be made to locate a 1980 performance evaluation that was found to be missing from petitioner's file (J.A. 20). On November 9, 1983, the Assistant Secretary of the Navy for Manpower and Reserve Affairs approved the BCNR's decision (*ibid.*).[3]

On November 10, 1983, petitioner filed an amended complaint in the district court. In order to preserve the district court's jurisdiction over his back-pay claim (see 28 U.S.C. 1346(a)(2)), petitioner amended that claim to waive all monetary relief in excess of $9,999.99. Amended Complaint 50-51 (Nov. 10, 1983). In all other respects, the prayers for relief in the two complaints were the same.

4. On December 6, 1983, the district court granted judgment for respondents (Pet. App. A2-A8). First, with respect to the Article 138 claim, the court held

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[3] Although petitioner had been slated for discharge by November 1, 1983, in the interim it had become apparent to the Marine Corps that petitioner, because of his medical condition, might be entitled to retirement with a ratable service-connected disability instead. See 10 U.S.C. 1201 *et seq.* As a result, the Secretary of the Navy ordered petitioner's discharge held in abeyance while he underwent the necessary physical evaluations. See 10 U.S.C. 640. In any event, on October 31, 1983, when it was evident that the BCNR would not act before November 1, and despite the ongoing disability proceedings, petitioner asked for and the district court granted a temporary restraining order preventing his discharge. J.A. 2-3.

petitioner's First and Fifth Amendment objections to be insubstantial, concluding "that the processing of [his] Article 138 complaint comport[ed] with constitutional requirements" (*id.* at A6). The court determined that "[t]he investigation, report of findings, and remedial action satisf[ied] the minimum standards of procedural due process," and that petitioner's "allegations of [F]irst [A]mendment violations similarly do not warrant relief" (*ibid.*). The court concluded, however, that it "[could] not reexamine the substance of the Article 138 decision," by which the court appeared to mean the evaluation of evidence, factual findings, and remedial recommendations made by the various officers who reviewed petitioner's Article 138 file (*id.* at A5). The court pointed out that "Article 138 is an internal, military mechanism for handling complaints" and concluded that "judicial deference in matters of internal military management" compelled the conclusion that it "lack[ed] jurisdiction to review the merits of [petitioner's] Article 138 claim" (*id.* at A5, A4).

Turning to the BCNR's decision concerning petitioner's employment-related claims, the district court undertook review of that decision and held that the BCNR's conclusions were neither arbitrary, capricious, nor lacking a basis in substantial evidence (Pet. App. A7). The court stated that the BCNR had "carefully addressed [petitioner's] complaints both as to the accuracy of his fitness reports and as to the correctness and fairness of his failures of selection for promotion" (*ibid.*). The court recited the BCNR's findings that petitioner's "record before both promotion selection boards was substantially complete," that there was no indication that the 1983 Selection Board was even aware of petitioner's Article 138 Complaint, and that petitioner's record was not "so good that his failure to be promoted *must* have been on improper considerations" (*ibid.* (emphasis added)). The court determined that "these findings [were] reasonable and supported by substantial evidence" (*ibid.*).

5. Petitioner filed a notice of appeal to the Court of Appeals for the District of Columbia Circuit. On May 31, 1985, the court of appeals concluded that, because the case involved a back-pay claim and hence was based in part upon the Tucker Act, 28 U.S.C. 1346(a)(2), the appeal was required to be heard in the Court of Appeals for the Federal Circuit. Pet. App. A9-A18 (citing 28 U.S.C. 1295(a)(2)). The appeal was accordingly transferred to that court pursuant to 28 U.S.C. 1631.

On January 23, 1986, in a per curiam judgment order, the Federal Circuit affirmed the district court's decision "on the basis of that court's December 6, 1983 opinion" (Pet. App. A1). A request for rehearing, with suggestion for rehearing en banc, was denied on April 1, 1986.

SUMMARY OF ARGUMENT

I.

There is no justiciable controversy between petitioner and respondents at this stage of the litigation. In his brief, petitioner has marshalled his every grievance against the military without regard to considerations of standing or mootness or relevance to the question upon which the Court granted certiorari. But neither singly nor together do these various complaints add up to anything susceptible to this Court's review.

Petitioner's allegations can be grouped into four general categories: (1) that he was given biased performance evaluations and wrongly passed over for promotion; (2) that his First and Fifth Amendment rights were violated during the investigation of his Article 138 Complaint; (3) that his transfer out of OCS and removal from the ADB were improper; and (4) that third parties at OCS, including pregnant female Marines and defendants at courts-martial and ADB proceedings, have had their rights violated.

No justiciable controversy is to be found in any of these categories. (1) Petitioner's employment-related claims were rejected by the BCNR, whose decision was reviewed and affirmed by both the district court and the court of appeals. Petitioner did not seek certiorari on that issue, and the judgment against him on those claims is therefore final. (2) Petitioner's constitutional allegations were also considered on the merits by the district court and rejected. Petitioner has advanced no argument to suggest that the decision of the district court, as affirmed by the court of appeals, was erroneous. (3) Given petitioner's disability retirement from the Marine Corps, his claims that he was wrongly transferred out of OCS and improperly removed from the ADB are now moot. (4) Petitioner is not a pregnant female Marine and he was never a defendant at either a court-martial or an ADB proceeding. His attempt to redress injuries allegedly suffered by such third parties fails for lack of standing.

II.

The questions posed by petitioner in his petition and in his brief are not presented in this case. Petitioner's constitutional claims were reviewed on the

merits and rejected by the district court. His claims for equitable relief, to the extent that they related to those constitutional claims or to his challenge to the decision of the BCNR, were also reviewed and rejected. Thus, the district court did not hold, and we do not contend, that military personnel are "barred from all redress in civilian courts for constitutional wrongs" (Pet. i) or that military personnel should be categorically "denied judicial review when seeking only equitable relief for Constitutional, statutory, or regulatory violations committed by their superior officers" (Br. i).

The question presented by this case, assuming petitioner has standing to raise it, is whether federal courts should review Article 138 grievance proceedings. We contend that such review is both inappropriate and unnecessary. Article 138 was designed by Congress as an internal mechanism for the correction of military grievances. The military has established numerous regulations to make this remedy broadly available to servicemen without compromising the command structure and the demands of discipline. Courts are ill-equipped to review either those regulations or the merits of the myriad grievances that a serviceman can raise in an Article 138 Complaint. Congress has not authorized such review, and the settled reluctance of courts to intervene in the internal management of the military counsels against it.

Furthermore, such review is unnecessary. After exhausting his military remedies, an aggrieved serviceman has various avenues available to him by which judicial review of military decisions can be and frequently is obtained. To the extent that the underlying substance of an Article 138 Complaint of

Wrongs presents a judicially cognizable controversy, that controversy can be presented to the courts through one of these avenues explicitly designed by Congress or mandated by the Constitution. But in such cases, review is of the underlying controversy, not of the military's internal grievance process. Thus, all of a serviceman's constitutional, statutory, and regulatory rights, to the extent they are cognizable in federal court, can be protected without involving the courts at all in Article 138 proceedings.

ARGUMENT

I. THERE IS NO JUSTICIABLE CONTROVERSY BETWEEN PETITIONER AND RESPONDENTS AT THIS STAGE OF THE LITIGATION

Article III of the Constitution confines federal courts to the adjudication of actual "cases" and "controversies." The principal component of this restriction is the requirement that the party invoking the court's jurisdiction have "standing" to maintain his suit. *Allen* v. *Wright*, 468 U.S. 737, 750 (1984). Standing itself is a complex notion, embracing both prudential and constitutional considerations. See *Valley Forge Christian College* v. *Americans United*, 454 U.S. 464, 474-475 (1982). But it is well settled that, at an "irreducible minimum" (*id.* at 472), the plaintiff must "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen* v. *Wright*, 468 U.S. at 751. See also *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979); *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976). Furthermore, this "irreducible minimum" must exist at all stages of the litigation. If at any time there ceases to be a live controversy between the parties, the case is moot. *Iron Arrow Honor Society* v. *Heckler*, 464

U.S. 67, 70 (1983) (per curiam); *DeFunis* v. *Odegaard*, 416 U.S. 312, 316 (1974) (per curiam).

This Court has stated that the typical standing inquiry "requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Allen* v. *Wright*, 468 U.S. at 752. That inquiry is complicated in the instant case by the fact that petitioner brought two separate causes of action in district court, one seeking review of the BCNR decision and the other seeking review of his Article 138 Complaint. In seeking judicial review of the Article 138 proceeding, moreover, petitioner advanced both constitutional and nonconstitutional claims, and he sought relief both on his own behalf and on behalf of anonymous third parties.

Petitioner (*e.g.*, Br. 36-37) indiscriminately intermixes these various claims, altogether heedless of their relevance to the question on which he sought certiorari and of his own standing either to have raised them initially or to pursue them now. It is necessary, therefore, as a preliminary matter to separate out the various strands of petitioner's district court complaint, ascertain which of his claims are fairly encompassed by his petition for certiorari, and determine whether any of those claims presents a live controversy that petitioner has standing to pursue. Once the dust clears, we believe it apparent that in its present posture petitioner's lawsuit is not justiciable.

A. Petitioner's Employment-Related Claims Were Reviewed And Rejected By The Courts Below, And Petitioner Has Not Sought Certiorari On That Question

Petitioner claims to have suffered employment-related injuries traceable to respondents. First, he

contends (Br. 4, 6, 36, 37-38) that, as a result of his complaints about sex discrimination against female OCS Marines, he was given biased and inaccurate performance evaluations by Colonel Cooper which led to his being twice passed over for promotion.[4] Second, petitioner argues (Br. 3, 22, 37) that the Selection Board considering promotions to Major retaliated against him for his Article 138 Complaint by improperly denying him a promotion.[5]

Neither of these employment-related claims is properly before this Court. All of petitioner's allegations concerning his service record—including his fitness reports and promotion passovers—were con-

[4] Despite some intimations to the contrary (Br. 4, 37-38), petitioner was not, in the end, subjected to automatic discharge due to twice failing to gain promotion. Rather, as he himself acknowledges (Br. 6 n.8), he was retired from the Marine Corps due to physical disability.

[5] Although petitioner is somewhat vague on this latter point (see, *e.g.*, Br. 3, 22, 37), the alleged retaliation presumably consisted of his being passed over for the *second* time by the Selection Board. This Board met from March 8 to April 7, 1983 (J.A. 12), after Colonel Lawson had completed his investigation and issued his report on the Article 138 Complaint. Petitioner contended before the BCNR that, somehow, the Selection Board must have known about his Article 138 Complaint and failed to select him because of it. Although the BCNR found petitioner's allegations on this point completely unsubstantiated (J.A. 19-20), here at least there was a chronological possibility of retaliation. By contrast, the allegedly biased performance evaluations and the first promotion passover all occurred *before* petitioner made the Article 138 Complaint and, so, could not have been taken in retaliation for that Complaint. The two evaluations covered the periods June 23 to November 30, 1981, and December 1, 1981 to May 31, 1982; petitioner was first passed over for promotion in April, 1982; he did not file his Article 138 Complaint until September 29, 1982. J.A. 8-10.

sidered and rejected by the BCNR. The BCNR found "no basis for removal of either of the two contested fitness reports" and hence found "nothing objectionable in the fact that one or both of those reports was in Petitioner's record before the 1982 and 1983 promotion boards" (J.A. 19). The BCNR found that "Petitioner's record before both boards was substantially complete" and that neither of his failures of selection for promotion "was erroneous or unjust" (*ibid.*). And the BCNR expressly rejected petitioner's contention that he had been passed over in retaliation for his Article 138 Complaint (J.A. 19-20). The BCNR's decision was reviewed at petitioner's request by the district court and was affirmed "as supported by substantial evidence" (Pet. App. A7). That determination was in turn affirmed by the court of appeals (*id.* at A1). Petitioner did not seek certiorari on this question, nor would such fact-bound contentions have merited this Court's attention.

Petitioner's request for review by this Court (see Pet. i, 6) was restricted to the question "whether a district court has the jurisdiction to review an Article 138 proceeding." Petitioner's wide-ranging allegations concerning retaliation and promotion denial were not part of his Article 138 Complaint and have nothing to do with either the substance or the processing of that Complaint. Petitioner's employment-related claims therefore are not before this Court, and those claims must be ignored in determining whether petitioner's lawsuit in its present posture presents a justiciable controversy.

B. Insofar As Petitioner Raised Constitutional Objections To The Manner In Which His Article 138 Complaint Was Handled, His Arguments Were Considered and Rejected By The Courts Below, And Petitioner Has Not Challenged The Merits Of Those Constitutional Holdings

Petitioner alleges two species of constitutional injury connected with his Article 138 Complaint. He asserts that "the Article 138 Complaint investigation violated the Due Process Clause of the Fifth Amendment" (Br. 36). And he asserts that "his First Amendment right to free expression was chilled by Colonel Cooper's biased fitness reports and by the command influence exerted by Colonel Cooper" (*ibid.*). His First Amendment claims also appear to encompass the promotion board's supposed retaliation "against those who made official complaints" (Br. 37). Once again, of course, petitioner is intermixing the substance of his Article 138 Complaint with employment-related claims which formed no part of that Complaint and which, as we have shown above, are not properly before this Court. More fundamentally, however, petitioner proceeds from the erroneous premise that the district court refused to consider his constitutional claims, and states that the question presented (Pet. i) is "[w]hether citizens should be barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service."

This case does not present that question. Although the district court "conclude[d] that it [could] not reexamine the substance of the Article 138 decision" (Pet. App. A5), the district court did consider, and reject, petitioner's First and Fifth Amendment objections to the manner in which the Article 138 investigation was conducted. The court specifically held

"that the processing of [petitioner's] Article 138 complaint comports with constitutional requirements" (Pet. App. A6). It concluded that "[t]he investigation, report of findings, and remedial action satisfy the minimum standards of procedural due process" (*ibid.*). And it concluded that petitioner's "allegations of [F]irst [A]mendment violations similarly do not warrant relief" (*ibid.*). Because the district court did in fact consider the alleged constitutional defects in the Article 138 proceeding, this case does not present the question whether military personnel "should be barred from all redress in civilian courts for constitutional wrongs" (Pet. i). And because this case, therefore, provides no occasion for the Court to consider the terms on which judicial review of a serviceman's constitutional claims might be permitted, petitioner's extended discussion of that issue (Br. 35-43) is beside the point.

Petitioner, moreover, has advanced no argument that would tend to show that the district court's rejection of his constitutional claims was erroneous. Petitioner nowhere specifies the procedural defects that allegedly tainted the investigation of his Article 138 Complaint, much less contends that the defects, if any, were such as to violate the Due Process Clause. In fact, a review of the procedural steps comprising the investigation (see pages 5-10, *supra*) shows that it was conducted both thoroughly and fairly. Nor does petitioner offer any argument to suggest that the district court erred in rejecting his First Amendment contentions. Indeed, those contentions are largely based on allegations about fitness report bias and promotion board retaliation that the BCNR and the district court found to be factually unsupportable. In short, petitioner has said nothing

to support reversal of the judgment below on the merits of the constitutional issues.

C. Insofar As Petitioner's Article 138 Complaint Advanced Generalized Grievances And Addressed Wrongs Allegedly Suffered By Third Parties, Petitioner Lacks Standing To Pursue His Claims In Federal Court, And His Request For Judicial Review Of Those Claims Was Properly Dismissed

In his original Article 138 Complaint, petitioner alleged that there existed poor morale at OCS and improper command influence over courts-martial and administrative discharge proceedings. His Complaint requested that these matters be investigated and that "appropriate administrative action be taken to assure this situation does not occur in the future" (Art. 138 Rec. 39). Petitioner reiterates his allegations about improper command influence here (Br. 3, 5-6, 10-12, 16-17, 25, 36-38), supplementing them with allegations about sex discrimination against pregnant female Marines (Br. 6, 45).[6]

Petitioner has not alleged that he was a pregnant female Marine. Nor has he alleged that he was ever a defendant at a court martial or ADB proceeding, such that he could have been personally aggrieved by any reluctance of other individuals to vote or testify in accordance with their consciences. Petitioner nevertheless asserts (Br. 44-45) that he has standing "to submit a complaint on behalf of pregnant Marines, of oppressed members of Administrative Discharge Boards, and of any persons dissuaded from testifying on behalf of another due to command influence exercised by Colonel Cooper." Petitioner also asserts a generalized interest in seeing Article 138 and its accompanying regulations complied with —to ensure, "in other words, that Respondents obey the law" (Br. 38; see *id.* at 43).

Petitioner plainly lacks standing to advance these claims in federal court. As noted above, in order to have standing a litigant must "allege personal injury fairly traceable to the defendant's unlawful conduct and likely to be redressed by the requested relief." *Allen* v. *Wright*, 468 U.S. at 751. It is well established that a person cannot establish standing by piggybacking on harms allegedly suffered by absent third parties. *Warth* v. *Seldin*, 422 U.S. 490, 502 (1975); *Sierra Club* v. *Morton*, 405 U.S. 727, 733-734 (1972). In seeking to vindicate the rights of women Marines and court-martial defendants, petitioner advances concerns in which he "has an interest but no direct stake." *Diamond* v. *Charles*, No. 84-1379 (Apr. 30, 1986), slip op. 11. Such an "abstract concern * * * does not substitute for the concrete injury required by Art. III." *Id.* at 11-12 (quoting *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. at 40). The power to seek judicial review "is not to be placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'" *Diamond* v. *Charles*, slip op. 7 (quoting *United States* v. *SCRAP*, 412 U.S. 669, 687 (1973)).[7]

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[6] Petitioner's belated allegations of discrimination against women Marines at OCS formed no part of his Article 138 Complaint. Petitioner's statement to the contrary (Br. 3) is mistaken, as even a cursory reading of his Article 138 Complaint reveals. Art. 138 Rec. 17-26, 37-39, 41-43. The only mention of sex discrimination in the entire Article 138 proceeding is contained in a statement of a *witness*, Captain Becker. *Id.* at 50-52. Captain Becker did not initiate an Article 138 Complaint on her own, nor could she join in petitioner's Complaint. JAGMAN 1106b; Reg. App. 6. And petitioner never suggested that he was adopting these claims as his own.

[7] Petitioner contends that he has standing to use an Article 138 Complaint to vindicate the rights of third parties on the

Nor does petitioner's abstract interest in ensuring compliance with Article 138 and its accompanying regulations afford him standing. "[A]n asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." *Allen* v. *Wright*, 468 U.S. at 754. Petitioner must have a concrete interest stemming from a "distinct and palpable" injury. *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. at 100. As a Marine asserting generalized grievances about the Marine Corps, petitioner has no more of an individual stake in the outcome than a person seeking to complain of governmental misconduct based solely on his status as a citizen. "This Court has repeatedly rejected claims of standing predicated on 'the right, possessed by every citizen, to require that the Government be administered according to law.'" *Valley Forge Christian College* v. *Americans United*, 454 U.S. at 482-483 (quoting *Fairchild* v.

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theory that Navy regulations require Marines to "report to proper authority offenses committed by [Marine personnel] which come under their observation" (Br. 44 (original quotation marks omitted)). This contention is doubly flawed. First, the general obligation to report observed misconduct (Navy Regs. 1139; Reg. App. 18) does not translate into a right to use Article 138 to make that report. Article 138 is designed only to redress grievances personal to the complainant; a serviceman is not permitted to raise third-party or generalized grievances. See JAGMAN 1104(b), Reg. App. 5; Nemrow, *Complaints of Wrong Under Article 138*, 2 Mil. L. Rev. 43, 56 (1958). Second, and more importantly, even if a serviceman could use Article 138 to report general misconduct in the military, it would not follow that he had standing to air third-party grievances in federal court. A citizen has a civic duty to report suspected crimes to the police; but he does not have standing to invoke a court's jurisdiction to challenge the manner in which the police force goes about investigating tips. See *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973).

Hughes, 258 U.S. 126, 129 (1922)). Legal questions must be resolved, "not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College* v. *Americans United*, 454 U.S. at 472.[8]

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[8] Petitioner claims (Br. 43) that a ruling in his favor "as to command influence, sex discrimination and the substance of his Article 138 Complaint, could only have served to enhance the military society by showing the lower ranks that even colonels can, and when appropriate should, be disciplined." But petitioner is obviously without standing to request, and the federal courts without jurisdiction to provide, such discipline, however salutory petitioner considers it to be. *Diamond* v. *Charles*, slip op. 9; *Linda R.S.* v. *Richard D.*, 410 U.S. at 619. "The federal courts were simply not constituted as ombudsmen of the general welfare." *Valley Forge Christian College* v. *Americans United*, 454 U.S. at 487.

Furthermore, aside from the disciplining of Colonel Cooper, petitioner appears to have received all the relief that he requested. With respect to his claims of illegal command influence, he asked simply that they be investigated and that appropriate action be taken to assure that the problem did not recur. Art. 138 Rec. 39. His claims were investigated and, despite the lack of any specific finding of wrongdoing on Colonel Cooper's part, the Commanding General did order that steps be taken to ensure that all subordinate leaders and members of OCS fully understand the prohibition against improper interference in judicial and administrative proceedings, and that their participation in such proceedings would not be subject to improper scrutiny. *Id.* at 14.

In addition, although petitioner failed to assert any sex discrimination claims in his Article 138 Complaint, the Commanding General also advised Colonel Cooper of Captain Becker's allegation about discrimination against women students at OCS. The Commanding General neither accepted nor rejected this allegation, but it was a matter that he believed should be brought to Colonel Cooper's attention. He did so by directing that policies concerning women Marines at OCS be formalized in accordance with applicable service regulations. Art. 138 Rec. 14-15.

D. Insofar As Petitioner's Article 138 Complaint Alleged Injury Personal To Himself, His Claims Are Now Moot Or Are Otherwise Nonjusticiable

In his Article 138 Complaint, petitioner might be thought to have advanced two claims of concrete injury that were personal to himself and accordingly could provide him with standing to challenge the investigation of that Complaint. Petitioner contended (Art. 138 Rec. 38-39) both that he was transferred from OCS to another MCDEC unit, and that he was subsequently removed from the ADB, as a direct result of Colonel Cooper's dissatisfaction with his voting record on the Board. Both of these contentions were examined and rejected during the Article 138 investigation, and, as we explain below, we believe that the district court properly declined to undertake judicial review of these aspects of petitioner's complaint. There is, however, no need for this Court to consider the correctness of the district court's declination of such jurisdiction, since both of petitioner's claims of injury are now moot.

Petitioner originally cited his transfer from OCS merely as an example of what he considered to be improper command influence. He specifically noted in his Article 138 Complaint that he was not seeking reassignment to OCS because he believed that he would no longer be effective in that post (Art. 138 Rec. 44). Even if petitioner had requested reassignment to OCS, however, that request would now be moot due to petitioner's disability retirement from the Marine Corps. Reassignment to OCS is not a possible form of relief; nor is there any other form of relief that petitioner has requested or that a court could grant to redress this alleged wrong. Thus, petitioner's allegedly improper transfer from OCS does not present a live controversy.

Petitioner's claim that he was improperly removed from the Administrative Discharge Board is likewise moot. During the Article 138 investigation, it was determined that petitioner's removal from the Board, even though not improperly motivated, had been accomplished in an administratively incorrect manner. Art. 138 Rec. 106-107. Petitioner was thereupon reinstated as a voting member of the ADB, notwithstanding his transfer from OCS. Petitioner in fact continued to participate in ADB proceedings as his schedule and medical condition permitted, until the term of the Board to which he had been appointed expired on December 31, 1982. Since petitioner has already received the relief he requested on this score, and since his retirement renders further relief along these lines impossible, this claim of injury also fails to present a live controversy.

In a subsequent endorsement to his Article 138 Complaint, petitioner did allege a third species of "injury" personal to himself, but not of a kind cognizable in federal court. In the course of the Article 138 proceedings, Colonel Cooper responded to petitioner's Complaint of Wrongs with comments that petitioner considered unfavorable to himself and incorrect. Petitioner thereupon amended his Complaint to include a rebuttal to that material and a demand that Colonel Cooper make "a formal, written apology for and a retraction of all adverse matter affecting me." Art. 138 Rec. 26. Neither this alleged affront, however, nor petitioner's umbrage and demand for satisfaction, create a justiciable controversy.

Petitioner's service record was totally unaffected by Colonel Cooper's comments since the Article 138 proceeding is self-contained and forms no part of the complainant's service record (see note 15, *infra*). No personnel action was taken with respect to peti-

tioner on the basis of those comments.[9] Colonel Cooper's comments, therefore, caused no "concrete injury" to petitioner. *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208, 220-221 (1974). The harm to petitioner, if any, is necessarily abstract, since the only conceivable remaining redress would be a belated apology from Colonel Cooper. The federal courts do not exist to serve as seconds in such affairs of honor. "The power to declare the rights of individuals and to measure the authority of governments, this Court said 90 years ago, 'is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy.'" *Valley Forge Christian College* v. *Americans United*, 454 U.S. at 471 (citation omitted).

In sum, all the various claims that petitioner has indiscriminately thrown into the hopper of his brief, whether considered separately or together, fail to create a justiciable controversy. His employment-related claims have already been decided against him both in the military and in the courts. He did not seek certiorari on that issue, and the judgment against him on those claims is therefore final. Petitioner's constitutional allegations were likewise rejected below, and he has advanced no argument to suggest that the decision of the district court, as affirmed by the court of appeals, was erroneous in that respect. To the extent that petitioner has claimed injury personal to himself, his claims are either moot or otherwise nonjusticiable. To the extent that he is seeking to redress injuries allegedly suffered by third parties, he has no standing to do so. And to the extent that petitioner might be thought to raise miscellaneous procedural or constitutional objections, not considered by the courts below, to the manner in which the Article 138 investigation was conducted, those objections must also fail on grounds of mootness or lack of standing.[10]

[9] As noted above, petitioner's claim that his Article 138 Complaint resulted in his non-promotion was considered by the BCNR and found to be groundless (J.A. 19-20), and that finding was affirmed by the district court as "supported by substantial evidence" (Pet. App. A7).

II. ARTICLE 138 WAS DESIGNED BY CONGRESS AS AN INTERNAL MECHANISM FOR THE CORRECTION OF MILITARY GRIEVANCES, AND JUDICIAL REVIEW OF ARTICLE 138 PROCEEDINGS IS THEREFORE INAPPROPRIATE

If, contrary to our primary submission, the Court determines that this case in its present posture does involve a justiciable controversy, then the question before this Court is whether federal courts should undertake routine judicial review of the substance of Article 138 grievance proceedings. As we have already intimated (pages 22-24, *supra*), the contours of that question are not nearly as broad as petitioner suggests. Because the district court did review petitioner's constitutional claims, the question presented is not, as he says in his petition, whether military personnel "should be barred from all redress in civilian courts for constitutional wrongs" (Pet. i). Nor is the reformulation of the issue set forth in petitioner's brief—"[w]hether military personnel should be denied judicial review when seeking only equitable relief for Constitutional, statutory, or regulatory violations committed by their superior officers" (Br. i)—an apt rendering of the question before this Court. The district court did not suggest—nor would we, in

[10] Because this case does not in fact present the question (Pet. i) on which the Court granted certiorari, and because petitioner's claims are nonjusticiable under a straightforward (albeit factually intricate) application of well-settled principles, the Court may wish to dismiss the writ of certiorari as improvidently granted.

light of this Court's settled precedents to the contrary (see pages 44-46, *infra*), suggest—that all avenues of equitable relief are closed to members of the military. Indeed, the district court did review the employment-related claims that petitioner had presented to the BCNR, and those claims, had they been meritorious, could well have yielded petitioner some form of equitable relief.

Rather, the question presented here is whether the district court erred when it concluded "that it [could] not reexamine the *substance* of the Article 138 decision" (Pet. App. A5 (emphasis added)). That conclusion, in our view, represents a determination that the federal courts should not undertake plenary review of Article 138 grievance proceedings to ascertain, for example, whether the investigation was conducted in accordance with military regulations, whether the credibility of various witnesses was properly evaluated, whether the conclusions reached were supported by the evidence, and whether the relief ordered, if any, was adequate to redress the grievance. The district court held, in other words, that the judiciary should not undertake to review Article 138 proceedings *qua* Article 138 proceedings, as if they were proceedings of some civilian federal agency. That holding is correct.

A. There Is No Presumption In Favor Of Judicial Review Of Military Decisions

Petitioner cites no statutory authorization for judicial review of Article 138 grievance proceedings. Rather, he relies (Br. 31) upon the general presumption in favor of judicial review of final agency actions. See, *e.g.*, *Lindahl* v. *OPM*, 470 U.S. 768, 778 (1985); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140-141 (1967). Petitioner concludes that since Congress has not expressly precluded judicial review of Article 138 proceedings, such review follows as a

matter of course. Petitioner, however, has the presumption backwards. He overlooks the settled reluctance of courts to intervene in internal military affairs without an express mandate to do so.

The Constitution gives Congress the power "[t]o raise and support Armies," "[t]o provide and maintain a Navy," and "[t]o make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. Art. I, § 8, Cls. 12-14. These powers are "broad and sweeping" (*United States* v. *O'Brien*, 391 U.S. 367, 377 (1968)), and it is well established that, in the regulation of the military, the role of the courts is decidedly subordinate to that of Congress. "[P]erhaps in no other area has the Court accorded Congress greater deference. * * * Not only is the scope of Congress' constitutional power in this area broad, but the lack of competence on the part of the courts is marked." *Rostker* v. *Goldberg*, 453 U.S. 57, 64-65 (1981).

Congress, in turn, has recognized that substantial discretion must be afforded to the military in molding an effective fighting force. *Brown* v. *Glines*, 444 U.S. 348, 360 (1980). "To prepare for and perform its vital role, the military must insist upon a respect for duty and a discipline without counterpart in civilian life." *Schlesinger* v. *Councilman*, 420 U.S. 738, 757 (1975). For this reason, "the military is, by necessity, a specialized society separate from civilian society. * * * [T]he military has, again by necessity, developed laws and traditions of its own during its long history." *Parker* v. *Levy*, 417 U.S. 733, 743 (1974). These "laws and traditions * * * are founded on unique military exigencies as powerful now as in the past. Their contemporary vitality repeatedly has been recognized by Congress." *Schlesinger* v. *Councilman*, 420 U.S. at 757.

Courts, therefore, have been especially reluctant to intervene in any matter which "goes directly to the 'management' of the military [and] calls into question basic choices about the discipline, supervision, and control of a serviceman." *United States* v. *Shearer*, 473 U.S. 52, 58 (1985). The "complex, subtle, and professional decisions as to the composition, training, equipping and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches." *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973) (emphasis omitted). On such matters, it is not appropriate for a "civilian court to second-guess military decisions." *United States* v. *Shearer*, 473 U.S. at 58. Indeed, "it is difficult to conceive of an area of governmental activity in which the courts have less competence." *Gilligan* v. *Morgan*, 413 U.S. at 10.

In view of these principles, it would be plainly inappropriate for courts, when asked to pass upon military actions, to employ the same presumption in favor of judicial review that applies to decisions of civilian regulatory agencies.[11] The federal courts are

[11] Contrary to petitioner's assertion (Br. 45-46), the district court did not hold, nor do we here contend, that the Administrative Procedure Act, 5 U.S.C. 701(b)(1)(F), precludes judicial review of Article 138 proceedings. That Section defines the term "agency" to exclude "courts martial and military commissions," and we do not contend that an Article 138 proceeding is conducted by either of those entities. Our point is, rather, that Article 138 does not itself authorize, nor does any other statute expressly authorize, judicial review of the military grievance process. Thus, in keeping with the general reluctance of courts to intervene in internal military affairs and the special function of Article 138 as an internal mechanism for the correction of grievances, such review is inappropriate. In terms of the APA, Article 138 proceedings must be considered as "committed to agency discretion by law"

neither authorized nor equipped to oversee the military to that extent. In the military context, therefore, this Court has always looked for an express mandate before exercising its jurisdiction in a way that might interfere with the smooth functioning of the military. See, *e.g.*, *Feres* v. *United States*, 340 U.S. 135 (1950) (declining to apply the Federal Tort Claims Act to suits by servicemen for service-related injuries); *Orloff* v. *Willoughby*, 345 U.S. 83 (1953) (declining to review propriety of duty assignment); *Burns* v. *Wilson*, 346 U.S. 137, 142, 144 (1953) (plurality opinion) (giving narrow interpretation to scope of federal habeas corpus relief available to servicemen); *Gilligan* v. *Morgan*, 413 U.S. at 10 (declining to assume jurisdiction over training, weaponry and orders of National Guard); *Schlesinger* v. *Councilman*, 420 U.S. at 757-758 (limiting ability of servicemen to obtain injunctive relief for alleged wrongs, including constitutional violations); *Chappell* v. *Wallace*, 462 U.S. 296 (1983) (refusing to permit military personnel to maintain suit to recover damages from a superior officer for alleged constitutional violations).

It is against the background of these cases that petitioner's claim must be judged. It cannot be assumed, simply because Congress has provided servicemen with a statutory grievance procedure within the military, that Congress thereby intended to grant the courts plenary review powers over that grievance process. "[C]ourts must be careful not to 'circumscribe the authority of military commanders to an extent never intended by Congress.'" *Brown* v. *Glines*, 444 U.S. at 360 (citation omitted).

and therefore nonreviewable (5 U.S.C. 701(a)(2)). Furthermore, the denial of an Article 138 Complaint is not "final agency action for which there is no other adequate remedy in a court" (5 U.S.C. 704). See pages 43-49, *infra*.

B. The Nature And Function Of The Article 138 Grievance Process Counsel Against Routine Judicial Review

The district court in this case observed that "[t]here is no statutory authority for judicial review of Article 138 proceedings" and that this Court's decisions reveal a "fundamental reluctance to intrude on military decisionmaking, as a matter of judicial prudence if not always judicial power" (Pet. App. A5, A6). Noting the absence of precedents to support such review, as well as the "well-established principle[] * * * of judicial deference in matters of internal military management," the court correctly concluded "that it [could] not reexamine the substance of the Article 138 decision" (Pet. App. A5).

Article 138 Complaints and similar avenues for the redress of a serviceman's grievances against his superior officers have been an integral part of the military's disciplinary structure for well over a century.[12] The Article 138 process is a completely internal mechanism, integrated into the military justice system, and designed to allow the military chain of command to address and correct such grievances. By providing for investigation, review and redress

[12] Article 138 itself, in substantially its present form, was enacted in 1950 as part of the Uniform Code of Military Justice. It was intended as a "virtual reenactment" of similar provisions in the Articles of War and the Navy Regulations. Nemrow, *Complaints of Wrong, supra*, 2 Mil. L. Rev. at 46, 47. See H.R. Rep. 491, 81st Cong., 1st Sess. 36 (1949); S. Rep. 486, 81st Cong., 1st Sess. 33 (1949). The Articles of War have recognized such a procedure since at least 1806 (W. DeHart, *Observations on Military Law and the Constitution and Practice of Courts-Martial* 252-253 (1962)), and commentators have traced the history of Article 138 back to a military code promulgated by King James II of England in 1688. Nemrow, *Complaints of Wrong, supra*, 2 Mil. L. Rev. at 46.

by the immediate superior of the officer at whom the complaint is directed, Article 138 serves two functions. First, it provides an institutional avenue by which servicemen may complain about their immediate superiors. Second, it provides the chain of command with an opportunity to resolve substantiated complaints at the lowest possible level. The latter is a practical necessity if the concepts of command authority and command responsibility are to have meaning.

Consistently with both these functions, internal regulations have been promulgated to ensure that Article 138 is a broadly available remedy, but not one without limits. The regulations in effect at the time of petitioner's Article 138 Complaint, which have changed only slightly since then, set limits on the scope of "wrongs" that are cognizable in, as well as who may file and who may be the subject of, a Complaint (JAGMAN 1104, 1105(a) and (b); Reg. App. 5). Regulations also govern the form of the Complaint, the time limitations and exhaustion requirements that attend the filing of Complaints, and procedures for the withdrawal of, and precluding joinder in, Complaints (JAGMAN 1106(a)-(f); Reg. App. 6-7). The procedures for the processing, investigation and review of Complaints are likewise specified in the regulations (JAGMAN 1105(d), 1108-1114; Reg. App. 6-9). All these regulations have evolved over time and represent the considered judgment of the military as to the appropriate method to respond to grievances without disrupting the chain of command and undermining discipline.

The courts are ill-suited to engage in a review of these procedural regulations and their application in the context of particular Article 138 proceedings. To permit this internal military mechanism to be

continually readjusted by civilian courts would involve those courts in a disruptive foray into the established command structure of the military. It is for the military, not the courts, to determine, compatibly with the need to maintain discipline and preserve the command structure, how wide-ranging a particular investigation should be; whether the complainant should be entitled to hire outside counsel, or merely consult with a JAG attorney; whether the superior officer at whom the complaint is directed should be permitted a rebuttal, including statements gathered from members of his staff; and other such procedural considerations, all of which petitioner appears to have challenged in this case. To involve the federal courts in assessing the propriety of these procedures on an ad hoc basis would wholly distort the Article 138 process and shatter the informed balance struck by the military between the twin needs to redress grievances and maintain the command structure. As this Court stated in *Burns* v. *Wilson*, 346 U.S. at 140 (footnote omitted):

> [T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress.

Courts are even less suited to judge the merits of the myriad grievances likely to arise under Article 138. A grievance may be filed under Article 138 by any serviceman "who believes himself wronged by his commanding officer" (10 U.S.C. 938). The key term, "wronged," is left undefined, but is clearly wide-ranging. As one commentator noted of a predecessor provision: "In the absence of any definition of this

term * * *, the authorities have construed it as referring mainly to such wrongs as result from mistake of fact, misapprehension of law, or want of judgment on the part of the officer in regard to some matter connected with the 'internal economy' * * * of the command." W. Winthrop, *Military Law and Precedents* 600 (2d ed. reprint 1920), quoted in Nemrow, *Complaints of Wrong*, *supra*, 2 Mil. L. Rev. at 48. Article 138 is, in short, a general housekeeping provision and, given the distinctive characteristics of military life, it could become a vehicle by which servicemen would seek to involve the federal judiciary in the day-to-day administration of the Armed Forces.

As this Court explained in *Parker* v. *Levy*, 417 U.S. at 751, "the * * * relationship of the Government to the members of the military * * * is not only that of lawgiver to citizen * * *. [U]nlike the civilian situation, the Government is often employer, landlord, provisioner, and lawgiver rolled into one." Such comprehensive regimentation can give rise to complaints of unfairness covering every aspect of military life. Commanding officers are responsible for each serviceman's housing conditions, working conditions, duty assignments, training regimen, and discipline, as well as many other matters of greater or lesser importance to the serviceman. All such matters are potential subjects of Article 138 Complaints and, therefore, potential targets of judicial oversight. The "wrongs" covered by Article 138 include, among other things (Nemrow, *Complaints of Wrong*, *supra*, 2 Mil. L. Rev. at 54):

> [I]mproper deprivation of pass or leave privileges; denying, without sufficient cause, a married enlisted member of the command [the] privilege of living off the post and drawing sep-

arate rations; denying a noncommissioned officer, without sufficient cause, the privilege of occupying an available private squad room, or utilizing a separate noncommissioned officers' mess; imposing duties upon a noncommissioned officer which tend to degrade the rank; utilizing a noncommissioned officer for menial tasks, which could be performed by available subordinates; utilization, without proper authority, of subordinates on personal matters, such as cook, chauffeur, valet, gardener, and the like; requiring subordinates to purchase from personal funds articles of clothing, uniform, or equipment which are authorized but not required by regulations or custom; requiring subordinates to obtain permission to purchase or own [a] motor vehicle; failure to adhere to known command policies with respect to pretrial or post trial confinement; failure to consider, without justification, a subordinate for promotion although he is eligible and [a] vacancy exists; improper efficiency ratings; [and] imposition of punishment in guise of additional training.

As the above list of examples shows, Article 138 Complaints range too widely to admit of routine judicial review. Congress could not have intended, simply by providing an internal mechanism for the correction of such grievances, to authorize judicial oversight of all these aspects of military life. Nor are courts well qualified to oversee such matters, which will frequently involve military judgments that judges are ill-equipped to evaluate. As already noted, "it is difficult to conceive of an area of governmental activity in which the courts have less competence." *Gilligan* v. *Morgan*, 413 U.S. at 10.

The extraordinary demands that military life, in all its aspects, places on servicemen, will inevitably give rise to tensions not found in civilian contexts.

See *Orloff* v. *Willoughby*, 345 U.S. at 94 ("Discrimination is unavoidable in the Army. Some must be assigned to dangerous missions; others find soft spots."). Moreover, commanding officers, who are responsible for insisting on military discipline, must often deal with servicemen who are unfamiliar with "the longstanding customs and usages of the services" (*Parker* v. *Levy*, 417 U.S. at 746-747) and with the "laws and traditions governing [military] discipline" (*Schlesinger* v. *Councilman*, 420 U.S. at 757). The military must "ingrain * * * reflexes" (*Department of the Air Force* v. *Rose*, 425 U.S. 352, 368 (1976)); the habit of automatic obedience that will lead a serviceman to risk his life in combat cannot be taught through the ordinary methods of civilian education.

For all these reasons, servicemen will sometimes be required to follow procedures and to adopt routines that may strike a civilian as arbitrary but that are, in the judgment of military officials, important in instilling the habits that create an effective fighting force. The federal district courts are simply not qualified to judge the propriety of such procedures and routines. Commanding officers, furthermore, should not "have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions," such as "whether and how to place restraints on a soldier's off-base conduct." *United States* v. *Shearer*, 473 U.S. at 58. Yet just such an uncalled-for intrusion into military life would follow if Article 138 Complaints were routinely reviewable. "It is not difficult to see that the exercise of such jurisdiction as is here urged would be a disruptive force as to affairs peculiarly within the jurisdiction of the military authorities." *Orloff* v. *Willoughby*, 345 U.S. at 94-95.

In short, the potentially wide-ranging nature of Article 138 Complaints and the special nature of military training make Article 138 proceedings a particularly inappropriate candidate for judicial review. Such review would inevitably involve the federal judiciary in the daily micro-management of the military. Congress has not authorized such involvement, and courts should not be quick to assume it. This Court recently rejected arguments for plenary review of certain intramilitary disputes on the ground that such review would inevitably "tamper with the established relationship between enlisted military personnel and their superior officers," a relationship "at the heart of the necessarily unique structure of the Military Establishment." *Chappell* v. *Wallace*, 462 U.S. at 300. And, as the Court wrote on an earlier occasion (*Orloff* v. *Willoughby*, 345 U.S. at 93-94):

> [J]udges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates.

Citing these considerations, the few courts that have expressly considered the question have anticipated the courts below in concluding that routine judicial review of Article 138 proceedings would be inappropriate. In *Cortright* v. *Resor*, 447 F.2d 245 (2d Cir. 1971), cert. denied, 405 U.S. 965 (1972), Judge Friendly noted that Congress has established "in Art. 138 of the Uniform Code of Military Justice" a procedure for considering and fairly resolving military grievances, and he concluded that a federal court "do[es] not sit as a super-Judge Advocate General to review determinations made under that Article" (447 F.2d at 253). At least one district

court has reached the same conclusion. See *Moore* v. *Schlesinger*, 384 F.Supp. 163, 166 (D. Colo. 1974). To our knowledge, no court has ever accepted petitioner's argument that the federal courts should undertake plenary review of a completed Article 138 investigation.[13]

C. There Are Ample Alternative Means By Which A Serviceman Injured By Official Action May Seek Judicial Redress

"The special status of the military has required, the Constitution has contemplated, Congress has created, and this Court has long recognized two systems of justice, to some extent parallel: one for

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[13] Petitioner cites ten cases (Br. 35) to document his assertion that "[n]umerous courts have reviewed Article 138 Complaints," but none of those cases in fact supports that assertion. Six of the cases cited by petitioner did not involve Article 138 Complaints at all. In the seventh, *United States ex rel. Berry* v. *Commanding General*, 411 F.2d 822 (5th Cir. 1969), the court dismissed a suit brought by two servicemen for failure to exhaust their intramilitary remedies under Article 138. Accord, *Muhammad* v. *Secretary of the Army*, 770 F.2d 1494, 1495-1496 (9th Cir. 1985); *Ogden* v. *United States*, 758 F.2d 1168, 1178 (7th Cir. 1985); *McGaw* v. *Farrow*, 472 F.2d 952, 957-958 (4th Cir. 1973). In the eighth case, *Turner* v. *Callaway*, 371 F. Supp. 188 (D.D.C. 1974), the court specifically declined to review the serviceman's Complaint of Wrongs.

In the last two cases cited by petitioner—*Colson* v. *Bradley*, 477 F.2d 639 (8th Cir. 1973), and *Schatten* v. *United States*, 419 F.2d 187 (6th Cir. 1969)—the courts did order that an Article 138 investigation be *initiated* in response to a serviceman's Complaint of Wrongs. But neither of those courts undertook what petitioner requests here—plenary review of the substance of an already-completed Article 138 proceeding. Since the military authorities in the instant case did investigate petitioner's Complaint, there is no need for the Court here to consider whether *Colson* and *Schatten* were correctly decided.

civilians and one for military personnel." *Chappell* v. *Wallace*, 462 U.S. at 303-304. These largely parallel systems do, however, converge at a number of points. After exhausting his military remedies, an aggrieved serviceman has various avenues available to him, both from within the UCMJ and via record corrections boards, by which judicial review of military decisions can be and frequently is obtained. Furthermore, a serviceman with constitutional claims may in certain circumstances bring those claims directly to federal court. Given the availability of these options, judicial review of Article 138 grievance proceedings for substantive and procedural defects is not only unwise and unjustified, it is altogether unnecessary to preserve the rights of military personnel.

The most obvious point of convergence between the systems of military and civilian justice occurs in the case of courts-martial and administrative discharge proceedings. Each is governed by its own set of regulations providing procedural protections for the defendant, including a right to government-appointed counsel, and numerous layers of review within the military. Thus, a Marine may challenge an ADB decision before both the Navy Discharge Review Board (10 U.S.C. 1553) and the BCNR (10 U.S.C. (& Supp. III) 1552). Convictions of courts-martial may be directly appealed through several layers culminating in the Court of Military Appeals (10 U.S.C. 864-869). Once he has exhausted these intramilitary remedies, moreover, an aggrieved serviceman may seek redress in the civilian courts, whether by requesting review of an adverse BCNR decision (*Chappell* v. *Wallace*, 462 U.S. at 303) or, in the case of courts-martial, by petitioning for a writ of certiorari (10 U.S.C. (Supp. III) 867(h)) or seeking a writ of habeas corpus (*Burns* v. *Wilson*, 346 U.S. 137

(1953)). Thus, a defendant at a court-martial or ADB proceeding who was prejudiced by the sort of improper command influence alleged in petitioner's Article 138 Complaint could challenge the proceedings in federal court if he did not receive the redress to which he was entitled within the military.

Second, the Board for the Correction of Naval Records, which is composed of civilians appointed by the Secretary of the Navy, constitutes a broad avenue by which servicemen may obtain federal court review of a variety of claims pertaining to their service records. Congress has vested the Secretary of the Navy, acting through the Board, with plenary power to "correct any military record * * * when he considers it necessary to correct an error or remove an injustice" (10 U.S.C. 1552(a)). Under the Board's procedures, an aggrieved serviceman may request a hearing; if his claims are denied without a hearing the Board is required to provide a statement of its reasons. 32 C.F.R. 723.3(e)(2), (4) and (5), 723.4, 723.5. In appropriate cases the Board may issue orders leading to a retroactive promotion or an award of back pay (10 U.S.C. 1552(c)). Most significantly, as this Court recently noted, "Board decisions are subject to judicial review and can be set aside if they are arbitrary, capricious, or not based on substantial evidence." *Chappell* v. *Wallace*, 462 U.S. at 303. Indeed, the district court in the instant case did in fact review the various employment-related claims that petitioner presented to the BCNR, although the court, like the BCNR, found those claims to be without merit.

Third, as recently emphasized in *Chappell* v. *Wallace*, 462 U.S. at 304, "This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military

service." In appropriate circumstances, therefore, this Court has permitted servicemen to challenge the constitutionality of prescribed military procedures directly, rather than indirectly by means of an attack upon a court-martial or BCNR decision. See, *e.g.*, *Goldman* v. *Weinberger*, No. 84-1097 (Mar. 25, 1986) (First Amendment challenge to Air Force regulation prohibiting servicemen from wearing headgear indoors while on duty); *Brown* v. *Glines*, *supra* (First Amendment challenge to Air Force regulation authorizing base commanders to regulate circulation of petitions); *Parker* v. *Levy*, *supra* (attack on provisions of Uniform Code of Military Justice as unconstitutionally vague); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973) (equal protection challenge to benefit plans for military women). In view of the unique demands of military society, this Court has recognized that the circumstances in which servicemen should be permitted to raise such constitutional challenges ought to be narrowly defined. See, *e.g.*, *Chappell* v. *Wallace*, *supra* (holding that a serviceman may not bring a *Bivens* action seeking damages for alleged constitutional wrongs). But judicial review of constitutional claims remains available in a proper case.[14]

For these reasons, the Court would by no means be closing the courthouse door to members of the military by declining to make Article 138 proceedings routinely reviewable. Because the avenues to judicial relief discussed above are wholly sufficient to the

[14] In undertaking to review petitioner's First and Fifth Amendment claims here, the district court evidently concluded (Pet. App. A6) that those claims fell within the category of constitutional claims subject to immediate judicial review under this Court's decisions. Since, however, the district court rejected petitioner's constitutional claims as nonmeritorious, there is no need for the Court to consider whether that assumption of jurisdiction was correct.

redress of all military claims appropriately heard in federal court, there is no need for the courts to involve themselves at all in the military's internal grievance process. It is entirely possible, of course, that a claim qualifying for judicial review under one of the avenues discussed above might also be touched upon, directly or indirectly, during an Article 138 investigation. In such circumstances, however, the serviceman must seek review of the underlying claim, not of the Article 138 process by which the military investigated that complaint internally. A serviceman's underlying claim, in other words, is either judicially cognizable or it is not. If it is not judicially cognizable under the standards set forth by this Court, the claim becomes no more susceptible to judicial review simply because it happens to have been the subject of an Article 138 investigation.[15]

[15] Petitioner at one point suggests (Br. 47-48) that, even if Article 138 proceedings are not directly reviewable in federal court, the BCNR, whose decisions are judicially reviewable, should *itself* have reviewed the "record" of the Article 138 investigation for substantive and procedural errors. This backdoor effort by petitioner to secure review of his Article 138 Complaint is not properly before the Court. The BCNR expressly declined petitioner's request "for correction of the record of proceedings under Article 138," noting that the latter formed no part of "Petitioner's military personnel record" (J.A. 18). Petitioner not only failed to challenge this aspect of the BCNR's decision in the district court; he in fact took exactly the opposite position, stating unequivocally that the BCNR's decision not to review the Article 138 proceeding was correct. Memorandum of Points and Authorities in Support of Plaintiff's Cross-Motion for Summary Judgment at 27-28 ("More importantly, as plaintiff originally contended, Article 138 and the BCNR are separate methods for complaining of military misconduct. The BCNR * * * clearly agreed with this analysis in refusing to review the 138 Complaint investigation. Actually, their view is correct. * * * [A]rticle 138 proceedings and BCNR proceedings are separate remedies, the BCNR not

This Court has already recognized that Article 138 establishes an internal military grievance process distinct from the various avenues to judicial review discussed above. In *Secretary of the Navy* v. *Huff*, 444 U.S. 453 (1980) (per curiam), servicemen sought to have certain military regulations declared facially invalid as constituting an illegal interference with a serviceman's statutory right to communicate with members of Congress under 10 U.S.C. 1034. This Court refused to invalidate those regulations, concluding that the military's special structure, long recognized by both Congress and the courts, required that statutes pertaining to military matters be reviewed with particular sensitivity to the need for command authority (444 U.S. at 458). The Court noted that Article 138 was a means by which service members might complain about the misapplication of regulations governing the statutory right to communicate with Congress (*id.* at 457 n.5). Further, the Court stated that the federal courts could consider a claim that regulations implementing 10 U.S.C. 1034 were being misapplied (444 U.S. at 457 n.5). But the Court did not merge the two avenues of redress. The Court did not say that the Article 138 proceeding itself would be judicially review-

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sitting as an appellate body to review Article 138 proceedings which occur in factual contexts such as that in the instant case." (citations omitted)). In any event, the question of the scope of the BCNR's statutory jurisdiction to correct military records is, by the terms of the statute, expressly delegated to the Secretary of the Navy, subject to approval by the Secretary of Defense. See 10 U.S.C. (& Supp.) 1552 ("The Secretary * * * *may* correct any military record * * * when he considers it necessary to correct an error or remove an injustice." (emphasis added)). In view of petitioner's failure to raise this argument below, this case presents no occasion for the Court to consider whether the BCNR's view of its own jurisdiction is accurate.

able. Rather, review would be directly of the application of the regulations to determine whether they improperly impinged upon a statutory right (*ibid.*).

Similarly, in *Chappell* v. *Wallace*, the Court discussed the various means by which servicemen who felt aggrieved by alleged military misconduct could seek relief. The Court mentioned both Article 138 and the BCNR. 462 U.S. at 302-303. With respect to the BCNR, the Court specifically noted (*id.* at 303) that the Board's decisions would be subject to judicial review. In contrast, the Court neither stated nor implied that judicial review was available for Article 138 Complaints. Rather, the Court described the Article 138 procedure as one component of "a comprehensive *internal* system of justice to regulate military life" (*id.* at 302 (emphasis added)).

In sum, the Article 138 grievance process is neither a suitable nor a necessary candidate for judicial review. Courts should permit the internal military procedure to function unimpeded. To the extent that the claim underlying a Complaint of Wrongs is cognizable in federal court, that controversy must be presented to the courts through one of the avenues explicitly designed by Congress or mandated by the Constitution. In such cases, there will be no point for the court even to consider the Article 138 proceedings and, therefore, no occasion for the court to disrupt the military's informed balance between the desire to redress legitimate complaints and the need to maintain command discipline.[16] All of a serviceman's constitutional, statutory, and regula-

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[16] In an appropriate case, however, a court may well decide that exhaustion of intraservice remedies, including Article 138, is required prior to a resort to federal court. Such an exhaustion requirement would ensure against unnecessary judicial intervention in military affairs.

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tory rights, to the extent they are cognizable in federal court, can be protected without involving the courts at all in the Article 138 process.[17]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

ALBERT G. LAUBER, JR.
Deputy Solicitor General

MICHAEL K. KELLOGG
Assistant to the Solicitor General

RICHARD A. OLDERMAN
CHARLES R. GROSS
Attorneys

KEITH T. SEFTON
Lt. Col., USMC
Office of the Judge Advocate General
Department of the Navy

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[17] Once it is determined that petitioner's Article 138 Complaint does not merit judicial review simply in virtue of being an Article 138 Complaint, then his suit collapses. His underlying claims, insofar as personal to himself, concerned only his transfer from OCS and his removal from the ADB. Not only are these claims moot (see pages 28-29, *supra*), but this Court has already held that such claims are not reviewable in federal court. *Orloff* v. *Willoughby*, *supra* (declining to review propriety of duty assignment).

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